IN THE

Supreme Court of the United States

OCTOBER TERM, 1978
No. 78-1106

DR. HARRY W. THERIAULT,

Petitioner,

-against-

FREDERICK SILBER, Director, United States Chaplain Service, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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January 12, 1979.

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The petitioner, Dr. Harry (Shiloh) Theriault respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals for the Fifth Circuit entered on August 16, 1978.

OPINIONS BELOW

The order and opinion of the Court of Appeals, entered on August 16, 1978, is reported at 579 F.2d 302 (1978), (A-1). The original order and opinion of the same Court, entered on May 16, 1978, is reported at 574 F.2d 197, (A-6). The opinion of the District Court of the United States for the Western District of Texas is unreported (A-8).

JURISDICTION

The order of the Court of Appeals for the Fifth Circuit was entered on August 16, 1978. An order extending the time to file a petition for a writ of certiorari was granted by Justice Pawitt of this Court on November 13, 1978, exending the time for filing a petition to and including January 13, 1979 (A-38). This petition for certiorari was filed in that time frame. The jurisdiction of this Court is invoked under 28 USC § 1254(1).

QUESTIONS PRESENTED

When the leader of a church has struggled both in courts and prisons to permit the believers to exercise their religious rights but is frustrated by a District Court decision:

(1) May the Court of Appeals dismiss a proper and timely appeal on jurisdictional grounds just because the Notice of Appeal, filed by a prisoner pro se, contains references to the trial judge which could be characterized as insulting?

(2) Can the findings of the District Court that "The Church of New Songs" is not a religion be sustained in light of the standards set forth by this Court, the nature of the church activities and previous decisions regarding this church?

(3) Was the District Court's denial of all of petitioner's claims for relief and all exercise of religious freedom justified under the First and Fourteenth Amendment's commandments of religious freedom?

CONSTITUTIONAL PROVISIONS

United States Constitution
First Amendment:

> Congress shall make no Law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom

of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for redress of grievances.

Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTORY PROVISIONS

Federal Statute

18 USC 401. Power of court

A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as -

(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

(2) Misbehavior of any of its officers in their official transaction;

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command. June 25, 1948, c. 645, 62 Stat. 701.

Federal Rules of Appellate Procedure

Rule 3. Appeal as of Right - How Taken

(a) Filing the Notice of Appeal. An appeal permitted by law as of right from a district court to a court of appeals shall be taken by filing a notice of appeal with the clerk of the district court within the time allowed by Rule 4. Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the court of appeals deems appropriate, which may include dismissal of the appeal. Appeals by permission under 28 USC § 1292(b) and appeals by allowance in bankruptcy shall be taken in the manner prescribed by Rule 5 and Rule 6, respectively.

***

(c) Content of the Notice of Appeal. The notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment, order or part thereof appealed from; and shall name the court to which the appeal is taken. Form 1 in the Appendix of Forms is a suggested form of a notice of appeal.

Federal Rules of Civil Procedure 41:

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(b) Involuntary Dismissal: Effect Thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer

evidence in the event the motion is not warranted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown to right relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

STATEMENT OF FACTS

This case originated from charges brought by the petitioner, a prison inmate and a co-founder of a religious group known as "Church of the New Song," against federal prison authorities for deprivation of the constitutional rights to practice the rites of the religion.

The United States District Court entered a judgment against the petitioner on February 10, 1978, finding that: 1) the Church of the New Song is not a religion; and, 2) assuming that the church is a religion, the restrictions imposed on the petitioner's right to practice his religion are justified as necessary prison disciplinary measures. A timely notice of appeal was filed by the petitioner. The appellee moved to strike appellant's notice of appeal on the ground that it contained a vile and insulting reference to the trial judge.* The Court of Appeals

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*First notice of appeal - the objectionable language: "lying... opinion...hatefully and unamericanly entered by the Dishonorable Judge." (A-1)

struck appellant's notice of appeal and gave appellant ten days in which to file a proper notice of appeal. The appellant then filed a second notice of appeal but repeated some of the language.* Thereupon the Court of Appeals dismissed the appeal with prejudice.

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*Second notice of appeal - the objectionable language reads:

> ...lied pointblankly... lying judge, who has no right to lie...lying decision...pointblank lies.
>
> Today is May 23, 1978 and plaintiff requests that this court not lie too.

[The decision of the Court of Appeals does not refer to this last sentence so it cannot be construed as a basis of its decision although the request may be considered less than flattering.] (A-2)

Reasons for Granting the Writ

POINT I.

THE COURT OF APPEALS' DISMISSAL OF PRISONER'S PRO SE APPEAL MERELY BECAUSE THE NOTICE OF APPEAL CONTAINED REFERENCE TO THE TRIAL JUDGE AS LYING CONSTITUTES AN UNCONSTITUTIONAL AND UNLAWFUL DENIAL OF JUSTICE.

There are three conceivable sources of the Court's authority to dismiss the appeal by petitioner: 1) Federal Rules of Appellate Procedure, Rule 3, which provides for dismissal of the appeal for untimely or improperly filed notice of appeal; 2) the Court's inherent power to enforce compliance with its orders, 3) the Court's power to punish for contempt:

Dismissal for Untimely or Improperly Filed Notice of Appeal

In recent years federal courts have followed a liberal practice with respect to pro se litigants, recognizing the difficulties inherent in proceeding without counsel while incarcerated.

incarcerated. Evidencing this practice are the many cases in which technically inadequate papers filed pro se have been held the equivalent of a proper notice of appeal.* The

*Illustrative decisions are: Fallen v. United States, 378 US 139, (notice of appeal by a prisoner in the form of a letter delivered, well within the time fixed for appeal, to prison authorities for mailing to the clerk of the district court held timely filed notwithstanding that it was received by the clerk after expiration of the time for appeal; the appellant "did all he could" to effect timely filing); Richey v. Wilkins, 335 F.2d 1 (2d Cir. 1964) (notice filed in the court of appeals by a prisoner without assistance of counsel held sufficient); Halfen v. United States, 324 F.2d 52 (10th Cir. 1963) (notice mailed to district judge in time to have been received by him in normal course held sufficient); Riffle v. United States, 299 F.2d 802 (5th Cir. 1962) (letter of prisoner to judge of court of appeals held sufficient). Earlier cases evidencing "a liberal view of papers filed by indigent and incarcerated defendants" are listed in Coppedge v. United States, 369 US 438, 442, n.5, 82 S.Ct. 917, 8 L.Ed.2d-21 (1962).

rationale underlying these decisions was well expressed by the Court of Appeals for the Fourth Circuit in Gunther v. E.I. DuPont de Nemours & Co., 255 F.2d 710, 717 (1958):

> The purpose of the notice [of appeal] is to acquaint the appellee and the appellate court with the fact that an appeal has been taken from a particular case. When it appears that adequate information is given by the notice, the appeal should not be dismissed for mistakes which do not mislead or prejudice the appell. [citations omitted]

In the present case, respondents do not claim that they were misled or prejudiced by petitioner's notice of appeal. Petitioner's notice contained all the requisite information, was substantially correct in form, and clearly evidenced his intent to appeal. Frustrated litigants get excited and often use unwarranted words and phrases no member of the bar would or should. What may be a reversible error is called a "lie" by that frustrated pro se litigant. Yet this was the only defect causing dismissal - a defect irrelevant to the purpose of a Notice of Appeal.

Petitioner's use of the word lies is based on at least four different factors: the judicial rhetoric with which he and his religion were treated was less than polite, i.e., "unmistakable stench of the skunk"; (A-32) the fact that while this case was on remand by the Court of Appeals to "ventilate" the issues the District Court both criticized that remand for that purpose (A-9) and reaffirmed all previous findings of facts (A-30), years of frustration with the judicial system (see cases cited at fn. 7, Theriault v. Silber, (A-3) including the reversal of a finding of contempt against two wardens' refusal to follow an order permitting a "trial run" of his religion, (A-12); and a transfer to another out-of-jurisdiction prison after that order; the belief that many of the District Court's statements are lies.

If "a paper will not be deemed inadequate as a notice of appeal because of unformality in its form or title," Fitzsimmons v. Yaeger, 391 F.2d 849, 853 (3rd Cir. 1968), a paper should not be deemed inadequate because of unformality in its wording. The severity of the penalty imposed here - loss of an intended appeal on the merits - far exceeds the gravity of any wrong committed, particularly

given the importance of the constitutional right and context of high emotions. In the absence of any finding that the notice of appeal was otherwise improper, untimely, or that it misled or prejudiced the appellee, the Court's dismissal of the appeal cannot be justified under Fed. R. App. P., Rule 3.

Dismissal as an Exercise of the Court's Inherent Power to Compel Compliance with its Orders.

It has been recognized that dismissal with prejudice may be imposed for disobedience of an order of the Court. This power is inherent in the Court, as well as being recognized in the federal procedural rules.* Fed. R.

*See: Fed.R.Civ.P., Rules 41(b) 78 and 83, 28 USCA; Link v. Wabash Railroad Co., 370 US 626, 82 S.Ct. 1386, 8 L.Ed.2d 734 (1962), holding that involuntary dismissal may be entered sua sponte as a result of the inherent power of the Court, and is not limited by Rule 41(b) to cases in which the opposing party moves for dismissal; First Iowa Hydro-Electric Co-op. v. Iowa Illinois Gas & Elec. Co., 245 F.2d 613 (8 Cir. 1957) cert. den.

Footnote cont'd

355 US 871, 78 S.Ct. 122, 2 L.Ed. 2d 761, dismissal for failure to give security and testimony on depositions as ordered; O'Brien v. Sinatra, 315 F.2d 637, pp. 641, 642 (9 Cir. 1963), dismissal for failure to comply with Court's order to file amended complaint; Agnew v. Moody, 330 F.2d 868 (9 Cir. 1964), noncompliance with order to replead to comply with Rule 8(a), Fed.R.Civ.P. Cf. Societe Internationale, etc. v. Rogers, 357 US 197, 78 S.Ct. 1087, 2 L.Ed. 1255 (1958); Vol. 35B, C.J.S. Federal Civil Procedure §798, p. 73.

Civ. P., Rule 37(b) provides for dismissal of an action for refusal to make discovery, and 41(b) is concerned with involuntary dismissal for failure to prosecute or to comply with rules or any order of Court during trials.

Dismissal of action with prejudice is the harshest judicial sanction. Such measures are used only in extreme circumstances, generally as a means of compelling the production of evidence which is indispensable in deciding the merits of the case. When a litigant's refusal to make discovery or to participate in good faith in the trial process forestalls a just determination of the issues on their merits, dismissal with prejudice is justified on the presumption that he has waived his right to present additional evidence. (Hammond Packing Co. v. Arkansas, 212 US 322, 29 S.Ct. 370 53 L.Ed. 530, 15 Ann. Cas. 645 (1909); See also Dallas Cabana Inc. v. Collier, 469 F.2d 606, (5th Cir., 1972). This power to create a presumption of fact is distinguished from the power to punish for contempt (Hammond Packing Co. v. Arkansas, supra). This Court has held that dismissal used the mere purpose of punishing for contempt is a violation of Due Process.

Hovey v. Elliott, 167 US 409, 17 S.Ct. 841, 42 L.Ed. 215 (1897).

In the present case, the petitioner's refusal to eliminate an "insulting" remark from the notice of appeal did not in any way forestall the Court's ability to determine on the merits of the case, and no presumption of waiver of defense can be inferred from petitioner's refusal. The Court's dismissal of the appeal was not intended as a measure to compel the production of evidence, and hence could not be justified as an exercise of its inherent power to compel compliance with court orders. The Court's action, therefore, can only be interpreted as a form of mere punishment for contempt.

The Court's Power to Punish for Contempt

The Court's power to punish for contempt of its authority is delineated by legislation under 18 USC § 401 and § 402 which provide that a Court of the United States shall have power to punish by fine or imprisonment, or both, any act of contempt prescribed by statutes. It is a legislative declaration that the power of punishing for contempt shall not exceed beyond its known and acknowledged limits of fine and

imprisonment Anderson v. Dunn, 5 US 204, 6 Wheat 204, 5 L.Ed. 242 (1821).

In Hovey v. Elliott, supra, it was held that a Court did not have the right to strike from the files the answer of a defendant summoned in contempt and to condemn him without a hearing on the theory that he had been guilty of a contempt. The Court held that the power of the Court to deny a favor to a person in contempt does not include the power to refuse to a person in contempt the right to defend in the principal case on the merits.

The United States Court of Appeals of the Fifth Circuit, the same Court that dismissed the appeal of this petitioner for contempt, held in Deauville Associates, Inc. v. Eristavi-Tchilcherine et al. 173 F.2d 745, 746, (5th Cir., 1949) that

> A litigant may be punished for contempt by fine or imprisonment, or both, Sec. 387, Title 28 USCA [now 18 USCA § 402]; but the court should not prescribe, as a means by which he should purge himself of such contempt that its doors be closed to him in the defense of either his liberty or his property.

Due process of law signifies a right to be heard in one's defense. These decisions establish that these are constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause. Denial of a litigant's right to defend "as a mere punishment" is a clear violation of the Fifth Amendment of the Constitution. (Societe Internationale, etc. v. Rogers, 357 US 197, 78 S.Ct. 1087, 2 L.Ed. 1255 (1958)

This case has raised important questions as to the limitation of Circuit Courts's power in light of the Fifth and Fourteenth Amendments, and warrants granting of certiorari. Petitioner respectfully prays that he receives the relief he seeks.

POINT II

THE DISTRICT COURT APPLIED INCORRECT STANDARDS IN FINDING THAT THE CHURCH OF NEW SONG WAS NOT A RELIGION.

The threshold determination to be made in this case concerns whether or not the Church of New Song is a "religion" so as to come under the protection of the First Amendment. The term "religion" is not defined in the Constitution. A succinct and comprehensive definition of that concept has been held "a judicial impossibility" by the District Courts in Theriault v. Carlson (Theriault I) 339 F.Supp. 375, 382 (N.D. Ga., 1972) (A-39) and Remmers v. Brewer 361 Supp. 537, 540 (S.D. Iowa, when confronted with the question about the legitimacy of the Church of New Song as a religion. The following principles, however, can be elicited from a few cases that this Court has issued as guidelines in this area.

1) The validity of what a person believes cannot be questioned. It is not the function of the government or of the Court to consider the merits or fallacies of a religion, however fanatical or preposterous it may be.

(United States v. Ballard, 322 US 78, 64 S.Ct. 882, 88 L.Ed. 1148, 1944; see also: Fullwood v. Clemmer, 206 F.Supp. 370, 343 (DC DC, 1962); (see also the recent case Universal Life Church, Inc. v. United States, p. 11, unreported decision by the District Court for the Eastern District of California, 1974. See in general Weiss, "Privilege, Posture, and Protection, 'Religion' in the Law" 73 Yale 593, 1964).

2) "Religion" has been construed by this Court as a belief "in a relation to a Supreme Being" to embrace all religions and to exclude essentially political, sociological, or philosophical views. (United States v. Seeger, 380 US 163, 85 S.Ct. 850, 1965)

3) One test of whether a creed is a "religion" is whether a given belief occupies a place in the life of its possessor parallel to that filled by an orthodox religionist.

(United States v. Seeger, supra)

Applying these standards, the District Courts in both Theriault v. Carlson and Remmers v. Brewer, supra, found that the Church of New Song is a religion. The decision of the District Court in Remmers v. Brewer was affirmed by the Court of Appeals in Iowa 494 F.2d 1277 (8th Cir., 1974) certiorari denied 419 US 1012, 95 S.Ct. 332, 42 L.Ed. 2d 286) (1974). Theriault v. Carlson, however, was subsequently vacated and remanded, 495 F.2d 390, 395 (5 Cir. 1974), rehearing denied, 498 F.2d 1402 (5th Cir., 1974) cert. denied sub nom.

The present case was commenced in 1972. The District Court at El Paso, in denying the Church of New Song as a religion, made the following findings:

> (1) Theriault does not simply allege to hold a concept of Supreme Being of Deity nor the vaguer concepts of reality or God as outlined by Hinduism and Buddhism, but rather claims to be Jesus Christ." (A-17)

The petitioner contends that 1) the District Court's finding was based on a misinterpretation of the writings of the church; and 2) assuming that the petitioner did claim to be Jesus Christ, this claim could not be the basis for denying the validity of the Church of New Song as a religion as inquiries about the existence of a religion's "Supreme Being" or the truth of its concepts are foreclosed to government (United States v. Ballard, supra(the Ballards claimed immortality and other divine characteristics) and United States v. Seeger, supra). Many religious leaders have and do claim all or part of divinity from Christ through Mohammed through Joseph Smith to Daddy Grace, etc., and their religions are properly granted constitutional protection.

> (2) The District Court made another finding, on a subjective judgment based upon misinterpretations of the petitioner's teachings, that,
>
> > It should be noted that in the conscientious objector cases the beliefs held by the petitioners were in opposition to violence and war in contrast to the violence and destructiveness

of plaintiff in this case. (A-18)

The petitioner contends: 1) the Court's characterization of petitioner or his beliefs was totally unfounded. It has been established that the basic teaching of the Church of New Song is that Eclat, the supreme force or spirit, is a unifying and harmonizing spirit which unites all men in brotherhood.* It has been amply supported

*The petitioner does not wish to burden the court at this point with the literature of the Church of the New Song. However, if certiorari is granted, and if the court so desires, this literature will be supplied from pamphlets to the major treatises for the religion is deep in dogma and doctrine.

by testimonies throughout the trial that the Church of New Song has had rehabilitative effects on prison inmates and on people in general; 2) assuming that the petitioner was not totally passive, which is understandable in view of the nature of the prisons and the suppression imposed on the petitioner and his believers, violence and destructiveness, if proven, are only grounds for imposing specific restrictions on the forms of religious exercises. Churches, unfortunately, are often as familiar with swords as they are with devotional song. Did the crusades make the Catholic Church not religious? The validity of a religion cannot be denied on the basis that it is characterized as liable to invoke violence (like a 100 year war?). Such an interpretation might lead to the conclusion that completely passifistic religions of the conscientious objectors are the only valid religions if in fact no violence from their profession ensues.

(3) the District Court also stated:

> The professed belief of Mr. Theriault that he is the second Messiah.... appears to this Court to be insincere and, like the rest of the action of the petitioner, are essentially political, sociological and philosophical. (cf. the claims of the Ballards, US v. Ballard, supra; Weiss, op. cit.)

Hence, the Court had succeeded in enmeshing the three district and separate elements in religion, namely, the "truth" of the belief, the sincerity of its believers, and the religious nature of their belief. The Court's rationale seems to be that a person who claims to believe in what the judge finds unacceptable is insincere in his belief and therefore his belief is not religious in nature. This is a gross misinterpretation of the holdings of this Court in Ballard and Seeger, and is diametrically opposed to the basic philosophy of the First Amendment.

This case presents squarely to the Court the issue of what constitutes a

religion, particularly as it relates to a newly organized religion. In view of the importance of the issue of the lower courts, a certiorari should be granted.

POINT III.

THE DISTRICT COURT'S DENIAL OF A REASONABLE OPPORTUNITY FOR PETITONER TO EXERCISE HIS FAITH COMPARABLE TO THE OPPORTUNITY AFFORDED FELLOW PRISONERS OF OTHER RELIGIONS VIOLATES THE FIRST AND FOURTEENTH AMENDMENTS.

If the Church of the New Song is recognized as a religion, the remaining issue is whether the petitioner is entitled to enjoy the degree of religious freedom granted prisoners of other faiths.

In Cruz v. Beto, (405 US 319, 31 L.Ed. 2d 263, 92 S.Ct. 1079, 1972) a complaint by a state prisoner alleged that:

> ...while prisoners of other religious sects were allowed to use the prison chapel, the plaintiff and other Buddhist prisoners were not; that upon sharing Buddhist religious material with other prisoners, the plaintiff was put in solitary confinement; that the plaintiff was prohibited from corresponding with his

> religious advisor; that chaplains of the Catholic Jewish, and Protestant faiths, as well as copies of the Jewish and Christian Bibles, were provided at state expense; that weekly Sunday school classes and services were held for such sects; and that merit points, enhancing eligibility for desirable job assignments and early parole, were given prisoners as a reward for attending orthodox religious services. The District Court granted the defendant's motion to dismiss, concluding that the complaint concerned an area that should be left to the sound discretion of prison administration (329 F.Supp. 443), and the United States Court of Appeals for the Fifth Circuit affirmed (445 F.2d 801).

Granting the plaintiff's motion in forma pauperis and his petition for certiorari, the United States Supreme

> Court vacated the judgment and remanded the cause for a hearing and findings. In a per curiam opinion, expressing the view of six members of the court, it was held that a cause of action was stated by the complaint, since if the allegations were true, the state had violated the First and Fourteenth Amendments by discriminating against the Buddhist religion through denying the plaintiff a reasonable opportunity of pursuing his faith comparable to the opportunity afforded fellow prisoners who adhered to conventional religious precepts.

When the regulations imposed by prison authorities restricting religious practices fall more harshly on adherents of one faith than another, the Court will scrutinize the reasonableness of such regulations (Cooper v. Pate, 382 F.2d 518, 7th Cir., 1967; and Long v. Parker, 390 F.2d 816, 1968). The issue, therefore, is the reason-

ableness of the restrictions imposed on the petitioner: whether the opportunities afforded the petitioner are "reasonable opportunity of pursuing his faith comparable to the opportunity afforded fellow prisoners." (Cruz v. Beto, supra). And if the opportunity is not comparable to that afforded others, whether there is any reasonable ground for treating the petitioner differently.

In denying all reliefs sought by the petitioner, the District Court stated on:

> This Court finds that to allow petitioner to preach his "Doctrine" of violence, bloodshed and rebellion against authorities and to correspond with whomever he desires without proper surveillance would constitute "a clear and present danger of a breach of prison security or discipline or some other substantial interference with the orderly function of the institution." Knuckles v. Prasse, 435 F.2d 1255, 1256; Long v. Parker, 3rd Cir.,

390 F.2d 816, 820, 822.

> Accordingly, Petitioner's claims for relief in his First Amendment action and subsequent pleadings, whether or not his beliefs constitute a "religion", are hereby in all things DENIED. [emphasis added] (A-32)

The Court thus denied the petitioner all rights to practice his religion based on the findings that: 1) the petitioner's teachings might provoke violence; and 2) the petitioner's free exercise of religion without proper surveillance would endanger the orderly function of the prison.

In Long v. Parker (3rd Cir., 390 F.2d 816, 1968), a case cited by the District Court to deny petitioner's claims in the present case, the Court of Appeals held that Black Muslims should be allowed a reasonable opportunity to practice their religion in prison, despite the antagonistic nature of the teachings:

> Mere antipathy caused by statements derogatory of, and offensive to the white race is not sufficient to justify the suppression of religious literature even in a prison. Nor does the mere speculation that such statements may ignite racial or religious riots in a penal institution warrant their proscription. To justify the prohibition of religious literature, the prison officials must prove that the literature creates a clear and present danger of a breach of prison security or discipline or some other substantial interference with the orderly functioning of the institution. (at p. 822)

In the present case, there was no evidence to support the claim that

the teachings of the church per se presents clear and present danger, nor were there any findings that the petitioner is more dangerous than the other prisoners who enjoy the rights claimed by the petitioner. The discriminatory treatment is therefore totally unfounded. Note that petitioner claims retaliation and the Courts have noted solitary confinement was the response to his alleged "threats" revolving around scheduling a meeting. (A-11). Of course, retaliation as a fact has been found during the course of this litigation, Theriault v. Carlson (I), supra at 396 (A-42).

The District Court clearly erred in denying the petitioner all rights to practice his religion without any evaluation of the reasonableness of such a blanket denial. Furthermore, the Court completely deviated from all established principles in its reasoning that because the petitioner can not be permitted "unfettered" freedom in the practice of his religion "without proper surveillance," the prison can, instead of imposing proper surveillance on his practices, deny all rights to religious practice.

Moreover, all other followers, and there are more than a few,* are equally denied, denying them their religious freedom.

This Court, in the justly famous flag salute case, West Virginia State Board of Education v. Barnette (319 U.S. 624, 63 S.Ct. 1178) made the following statement in 1943, at a time when the exigency of war weighed heavily against the expression of individual dissent:

> We can have intellectual individualiam...and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes. When they are

*Although the District Court stated the religion had adherents in only 2 prisons, the contempt proceeding arose over correspondence with an individual in Florida. Theriault v. Carlson II, supra, at 394.

> so harmless to others or to the State as those we deal with here, the price is not too great. But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order. (at 1187)

Some people may have been roused to anger and even violence by observing the refusal to salute a flag but that could not lead to preventing the expression of ideas by those who refused. The Church of the New Song, petitioner urges, would not lead to violence but even if anything in its dogma suggests it might, that too is no reason to ban the whole religion to the petitioner and all other adherents.

Lower courts, the penal system, and the public need guidance from the Supreme Court in this area. Petitioner wants no more priviliges than any other religion yet he is allowed no religious participation or practice at all. Petitioner does not urge any

rites that violate neutral prison discipline regulations. Yet, because of the ideological content of his faith he is not allowed any religious expression. By remanding this case in this context, this Court can issue guidelines insuring that all religions are treated equally and religious ideas not banned because of claimed consequences. Rectifying this wrong will lead to a dearer, more consistent administration of justice.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Second Circuit.

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Respectfully submitted,

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